Supreme Court, U.S.
F I L E D
JUL 28 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 90-81

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

W. DAVID WESTON
Petitioner,

v.

JEFFREY G. BANKS, et al.
Respondents.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals For the Tenth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Counsel of Record for Respondents

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QUESTIONS PRESENTED

The questions presented for review as set forth by the petitioner, are as follows:

1. May the appellate court find that a lower court's decision was not clearly erroneous when the lower court's decision was based upon a conclusion of law which the appellate court correctly overturned, and may the appellate court then make new findings of fact as a sole basis for upholding the trial court's decision which new findings were contrary to the trial court's findings and the record?

2. May the appellate court make it's [sic] own findings of fact on a critical issue where such findings are contrary to the findings of the lower court and the record?

3. May the appellate court correctly make a conclusion of law in interpreting a contract critical to a determination of the case which conclusion is contrary to the conclusion of law of the trial court and not find the trial court's conclusion clearly erroneous?

4. After the appellate court decided that the agreement between the parties provided that the defendants were required to pay assessments, did the appellate court then err in further failing to determine that the district court's findings were clearly erroneous where the district court, to the contrary, found that the plaintiff wrongfully assessed the defendants and therein breached its fiduciary duty to the defendants and acted in bad faith?

PARTIES TO THE PROCEEDINGS

1. Weston and his Affiliated Entities

Cascade Energy & Metals Corporation, a Nevada Corporation
Gnolaum Unitrust, James F. Peters, Trustee
Gold Technics, Ltd., a limited partnership
Interphase Corporation
Rex Montis Silver Co.
Telegraph Mine Joint Venture

2. The Associate Defendants

Jeffrey G. Banks
Kenneth Caldwell
Coastal Computer Investments
Elmer J. Davis
David G. Henry
Roger A. Mann
Mann Caldwell Partnership
Robert A. Nickerson
Peter P. Samarin
Patricia Stoltenberg
Herbert W. Stoltenberg
Edwin Stoltenberg
Delford Ashley
George Slater
Patricia Slater
Robert Doub
Sam Hambarian
Alyce Hambarian
Lionel Ascher

3. The Gold Technics Defendants

Samuel Harmatz

Bernard Hodowski
A. C. Nejedly
Chris Waugh
H. E. Moses, D. D. S.
R. E. Donahey
Grace V. Duncan
Elliot Weinberg
Harmatz & Hodowski,
a partnership
Gold Technics, Ltd.

4. Amici Curiae

Harold Masunaga
Marion Harada
Ukio Ayabe
Lyle Muller
Charles Higashi
Joseph Green
William Ohara

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OPINION BELOW

The opinion of the Court of Appeals for the Tenth Circuit is reported as Cascade Energy & Metals Corporation v. Banks, 896 F.2d 1557 (10th Cir. 1990).

JURISDICTIONAL STATEMENT

The petition in this case should be dismissed as not being within the jurisdiction of the Court. The petition was not timely filed in conformity with Supreme Court Rule 13.4.

The jurisdiction of this Court is conferred by 28 U.S.C. §1254(1). Pursuant to 28 U.S.C. §2101(c), the time to petition for certiorari is 90 days after entry of the judgment. Supreme Court Rule 13.4 provides that if a petition for rehearing is timely filed in the lower court, the time for filing a petition for a writ of certiorari runs from the date of denial of the petition

for rehearing. The timeliness of the petition thus hinges on the date the petition for rehearing was filed in the court below.

The judgment of the Tenth Circuit Court of Appeals was entered on February 16, 1990. Tenth Circuit Rule 40.3 provides that the time for filing a petition for rehearing is 14 days. On March 12, 1990, the Tenth Circuit granted petitioner an extension until March 16, 1990 to file a petition for rehearing.

A petition for rehearing was not filed in the court of appeals until March 23, 1990. On April 25, 1990, the petition for rehearing was denied. Since the petition for rehearing was untimely, the 90-day period for filing a petition for writ of certiorari expired

on May 15, 1990, 90 days after entry of the judgment on February 16.

STATEMENT OF THE CASE

The material facts of this case, derived from the decision of the court below, Cascade Energy & Metals Corporation v. Banks, 896 F.2d at 1557, are set forth below because of numerous inaccuracies, misleading statements and misstatements and matters outside of the record contained in the petition.

In December, 1980, the petitioner, W. David Weston ("Weston"), a promoter in Salt Lake City, Utah, sold 35 sublease interests in mining claims known as the Telegraph Mine, to various investors, including respondents. As part of the transaction, the investors agreed to hire Cascade Energy and Metals Corporation ("Cascade"), whose president

was Weston, to develop and operate the mine.

The sale raised $1.05 million, of which $800,000 was loaned back to the investors as a development loan. Cascade, acting as the project manager, was to use the $800,000 to develop the mine and prepare the site for gold production. By July 1981, Weston and Cascade knew that the $800,000 was not sufficient to put the mine into production. They concealed this fact and, when the $800,000 loan ran out, embarked upon a scheme to squeeze additional money out of the investors.

Initially, Weston tried to coax the investors into voluntarily contributing additional capital to the project. But in late 1982, having achieved little success with this approach, Weston claimed that the Joint Operating

Agreement authorized Cascade to make mandatory assessments against the investors for additional capital contributions.

On December 17, 1982 Cascade filed suit in the United States District Court for the District of Utah, against the investors who refused to pay the assessments. The investors counterclaimed against Cascade and brought third-party claims against Weston and affiliated entities for fraud, breach of fiduciary duty and securities violations.

At trial, the attorney who drafted the Joint Operating Agreement testified unequivocally that the program was not assessable, and the trial court so found. The trial court also found that Weston and entities controlled by him misappropriated or otherwise failed to

account for $629,474.63 belonging to the joint venture and converted 35,000 shares of stock, which were held in trust. The court held that (i) the Joint Operating Agreement did not require the investors to make additional capital contributions, (ii) Weston and Cascade breached fiduciary duties to the investors by learning that the mine could not be put into production for $800,000, concealing that fact, and then attempting to make assessments to raise additional capital, and (iii) the suit was without merit and had been brought in bad faith.

Based on its findings and conclusions, the trial court entered judgment against Cascade and Weston (i) requiring them to account for $629,474.63 in misappropriated funds, (ii) ordering restitution of $70,449.68

in assessments wrongfully collected from the investors, and (iii) awarding the investors $265,000 in attorneys' fees.

On February 16, 1990, the Tenth Circuit entered its decision upholding the trial court's findings and affirming its judgment against Weston and Cascade in all material respects.[1] Weston filed an untimely petition for rehearing, which was denied by the court below on April 25, 1990. He then filed a petition for a writ of certiorari.

INACCURACIES, MISLEADING STATEMENTS AND MISSTATEMENTS OF FACT IN THE PETITION

The various questions raised by the petition all turn on findings made by the trial court which were affirmed by

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[1] On remand, the trial court was ordered to reduce the amount of the judgment against Cascade and Weston for misappropriation from $629,474.63 to $464,474.63.

the court of appeals. Many of petitioner's factual claims are so frivolous that they do not merit mention, much less refutation. Two examples are sufficient to show the Court the breadth of petitioner's distortions and misstatements of fact.

First, petitioner incorrectly maintains that the court of appeals "overturned" the district court on the issue of assessability and proceeded to make "new findings" not supported by the record. (Petition, pp. 8-14, 17-18, 40-41). On the contrary, the courts below were in complete accord. Both the district court and the court of appeals held that the Joint Operating Agreement between Cascade and the investors did not require the investors to make additional capital contributions for development and production costs. (896

F. 2d at 1568) The court below found that the Joint Operating Agreement was "clear on its face" on this point. (Id at 1568-69).

Second, petitioner repeatedly makes exaggerated, misleading and unsubstantiated claims as to the value of the mine and the viability of the project. (Petition, pp. 6, 10, 12, 13-14). The trial court made no findings on these matters. On the contrary, the trial court found that (i) the venture may have been destined to fail from the outset due to its complicated structure, (ii) the $800,000 development loan was not sufficient to get the mine into production, (iii) additional capital was required to make the project succeed, (iv) under a different organization, contract, management, royalty, cost or financing structure the property might

have been operated at a profit, and (v) Weston acted in bad faith by trying to squeeze additional money from the investors from a project he knew was not economically feasible. (Dist. Ct. Amended Finding No. 116[2]; 896 F.2d at 1569). Finally, from an isolated quote from the trial judge, petitioner attempts to transmogrify a "double negative" into an affirmative finding of viability. The judge merely stated that "I cannot find and have not found that the Telegraph Mine project with adequate financing... could not be economically viable." (Petition, p. 24) (emphasis added).

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[2]The trial court's amended findings were reprinted in Appendix "A-2" accompanying the petition.

SUMMARY OF ARGUMENT

Certiorari should be denied in this case for the following reasons:

1. The petition is jurisdictionally defective;

2. The court below gave full consideration to the issues and decided them correctly;

3. Petitioner has misstated and misrepresented essential facts;

4. The issues are not sufficiently important to warrant this Court's review;

5. A review by this Court would involve only questions of fact and the findings below are supported by substantial evidence; and

6. The facts are peculiar to this case and not likely to recur.

ARGUMENT

Certiorari should be granted only when there are "special and important reasons therefor." Sup. Ct. R. 10.1, Rice v. Sioux City Park Memorial Cemetery, 349 U.S. 70, 73-74 (1955). There is no good reason in law or fact to review this case.

The most obvious reason that certiorari should be denied is because the petition was filed out of time. Rehearing was not timely sought in the court below. See Jurisdictional Statement, supra. The time limits fixed by statute and this Court's rules are treated as jurisdictional in ordinary circumstances. See, e.g., Deal v. Board of Education, 402 U.S. 962 (1971) (denying certiorari); Teague v. Regional Commissioner of Customs, 394 U.S. 977 (1969) (denying certiorari); FTC v.

Minneapolis-Honeywell Regulator Co., 344 U.S. 206 (1952) (dismissing writ); Parker v. People of State of Illinois, 333 U.S. 571 (1949); Toledo Scale Co. v. Computing Scale Co., 261 U.S. 399 (1923). Cf. Sup. Ct. R. 13.3 (clerk "will refuse to receive any petition for a writ of certiorari which is jurisdictionally out of time").

This case is not appropriate for review by this Court because it presents only the question of whether the court below erred in its appraisal of the facts in the record. The petition merely requests this Court to second-guess the lower court on its interpretation of a private contract. In essence, petitioner seeks to have this case reviewed because he disagrees with the interpretation of a contract adopted by the lawyer who drafted it,

the trial court which heard the evidence, and the court of appeals which reviewed it.

The questions petitioner raise are unique to the specific contract involved and are of interest only to the parties to it. This case does not in any sense broadly concern federal mining law, the federal rules of evidence, standards of appellate review or other matters of general interest. The issues are unlikely to recur and are too narrow to warrant review by this Court.

This case involves only issues of contract interpretation grounded on disputed testimony. The case was decided by the lower courts on substantial evidence whose admissibility was not challenged. This Court's main task is to settle legal issues, not factual ones. Petitioner asks this

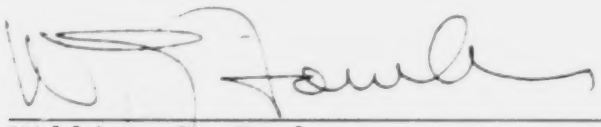
Court to make a third review of the evidence to see if it can find what two previous courts were unable to find--proof that the Joint Operating Agreement allowed Cascade to assess the investors for production costs. This Court has noted that such fact review is not a proper basis for certiorari: "We do not grant a certiorari to review evidence and discuss specific facts." United States v. Johnson, 268 U.S. 220, 227 (1925).

CONCLUSION

Petitioner has wholly failed to sustain his burden under Rule 10.1 of establishing that there are special and important reasons why a writ of certiorari should be granted. The petition should be denied as frivolous

and for lack of jurisdictional requirements, with costs and damages assessed against petitioner.

DATED this 26 day of July, 1990.



William G. Fowler
Counsel of Record for
Respondents

APPENDIX

Tenth Circuit Rule 40.3

Time for filing. In all civil cases in which the United States, or an agency or officer of the United States, is a party, the time for requesting rehearing or suggesting rehearing en banc shall be 45 days after entry of judgment. In all other cases petitions for rehearing or suggestions for rehearing en banc shall be filed within 14 days after the entry of judgment. The time for filing a petition for rehearing or suggestion for rehearing en banc may be shortened by order of the court, but will not be extended except for good cause shown.

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Cascade Energy & Metals Corporation v.
Jeffrey G. Banks, et al.

(Nos. 86-1156, 86-1157, 86-1202)

JUDGMENT
Entered February 16, 1990

Before, McKAY, BARRETT, and EBEL, Circuit Judges.

This cause came on to be heard on the record on appeal from the United States District Court for the District of Utah and was argued by counsel.

Upon consideration whereof, it is ordered that the judgment of that court is affirmed in part. The judgment is reversed in part.

The cause is remanded to the United States District Court for the District of Utah to enter judgment in accordance with the opinion of this court.

Entered for the Court

ROBERT L. HOECKER, Clerk

By: /s/ Patrick Fisher
Patrick Fisher
Chief Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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(Nos. 86-1156, 86-1157, 86-1202)

ORDER
Filed March 12, 1990

Before McKAY, BARRETT and EBEL, Circuit Judges.

This matter comes on for consideration of W. David Weston's motion for extension of time for filing a petition for rehearing.

Upon consideration whereof, the motion is granted. The petition for rehearing shall be filed in this court on or before March 16, 1990.

Entered for the Court

/s/ Robert L. Hoecker, Clerk
ROBERT L. HOECKER, Clerk

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Cascade Energy & Metals Corporation v.
Jeffrey G. Banks, et al.

(Nos. 86-1156, 86-1157, 86-1202)

ORDER
April 25, 1990

Before McKAY, BARRETT and EBEL, Circuit Judges.

This matter comes on for consideration of appellant's petition for rehearing filed March 26, 1990.

Upon consideration thereof, the petition is denied.

Entered for the Court

ROBERT L. HOECKER, Clerk

By /s/ Patrick Fisher
Patrick Fisher
Chief Deputy Clerk